Having regard to the conclusion at which we had arrived on the admissibility of the alleged confession by the appellant, and its effect on the case for the prosecution, it is unnecessary for us to decide these other questions. Moreover, were we to do so, our decision would be *obiter dicta*.

In the result, so far from being "a hopeless case" for the appellant, as the Judge thought, the case for the prosecution was weak and improbable in the extreme. Accordingly, we allowed the appeal, quashed the conviction, set aside the sentence of death and substituted an order of acquittal and discharge.

TENG BOON HOW

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
TAN SRI DATO' HARUN BIN MAHMUD HASHIM SCJ,
TAN SRI DATO' HAJI MOHD AZMI BIN DATO' HAJI KAMARUDDIN SCJ,
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CRIMINAL APPEAL NO. 05-176-90]
20 SEPTEMBER 1993

EVIDENCE: Trial Judge subjecting accused and defence witnesses to severe cross-examination - Whether by doing so trial Judge had assumed role of prosecutor - Whether trial Judge had gone beyond the desirable limits of judicial intervention in cross-examining on matters not arising from the evidence adduced - Whether accused's conviction was the result of such cross-examination - Consideration of s. 165 Evidence Act 1950 - Accused's right of silence - Trial Judge making adverse comments on accused's failure to disclose his defence before trial - Whether trial Judge drew inference of guilt from accused's silence - Whether trial Judge had misdirected himself - Whether there was evidence justifying inferences drawn by the trial Judge.

This was an appeal against conviction and sentence of death for trafficking in 26.30 grammes of heroin, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952. At the close of the case for the prosecution the trial Judge ruled that there was a case for the appellant to answer and the appellant was called to enter upon his defence. In the course of the defence evidence, the Judge himself subjected the appellant and the defence witnesses to severe cross-examination. The appellant was cross-examined upon re-call by the Court after he had given evidence and the other witnesses were cross-examined after examination in chief, cross-examination and re-examination by Counsel.

On appeal, the appellant contended that the Judge had assumed the role of prosecutor by cross-examining the appellant and the defence witnesses and that this cross-examination was not for the purpose of just clarifying testimony given but went much further, including within its range, matters not arising from the evidence adduced, and that the conviction was based mainly upon the results of such cross-examination.

The appellant further contended that in considering the defence of the appellant, the Judge had misdirected himself inasmuch as his comments on the defence suggested that a vital witness for the defence should be disbelieved because his name had not been disclosed by the appellant in a cautioned statement to the police and it was not until the trial that there was such disclosure.

Held:

[1] Notwithstanding the wide ambit of s. 165 of the Evidence Act 1950 the desirable limits of judicial intervention in the examination and cross-examination of witnesses enunciated in *Yuill v. Yuill [1945] P 15* and *Jones v. National Coal Board [1957] 2QB 55* would apply in this country. These limits apply with double force in the case of interrogation by a Judge of an accused person since the nature of examination contemplated by s. 165 of the Evidence Act is not examination or cross-examination of an inquisitorial nature for the purpose of entrapping an accused or of extracting from him damaging admissions upon which to build up a case against him or to supply a gap in the evidence of the prosecution. This is especially so in the case of an accused facing a capital charge and the failure of a trial Judge sitting alone to direct himself correctly in accordance with these principles must be treated in the same way as a failure to direct a jury correctly.

[2] The judgment showed that the Judge in this case did descend into the arena and did allow his judgment to be clouded by the results of his cross-examination of the appellant and the other defence witnesses. The judgment further showed clearly that the Judge, in convicting the appellant, relied on the results of his cross-examination.

[3] The learned Judge, in criticizing the appellant for his failure to disclose to the police the name of the taxi driver who was a vital witness, failed to recognise that the appellant had a right to silence when interrogated by the police whether before or after the caution.

[4] Although a Judge may properly comment that an explanation has been given for the first time at the trial, this has to be done with care and fairness to the accused in all the circumstances of the case.

[5] Where the Judge takes into account the belatedness of an explanation offered by an accused for the first time at the trial as diminishing the weight of that explanation this will usually not be fair unless he makes it clear that he recognises the right of the accused to remain silent and that he is not drawing an inference of guilt from such silence. In the present case the judgment of the Judge clearly suffers from these defects and so there was a clear misdirection on this score.

[6] The errors of the Judge, firstly in descending into the arena and secondly, in allowing his judgment of the facts to be clouded by the results of his cross-examination, an important par of which was directed at the non-disclosure by the appellant of his defence, were sufficient to lead to the quashing of the conviction.

[7] There was no evidence to justify the inferences made by the trial Judge that the appellant was about to carry out a sale of dadah to to some person at or about the time of his arrest and the learned Judge's judgment was also vulnerable on other grounds relating to findings of facts by the Judge by way of criticism of the appellant's case. In the circumstances a miscarriage of justice might well have occurred.

[Conviction quashed. Sentence of death set aside. Appellant acquitted and discharged].

[Bahasa Malaysia Translation of Headnote]

KETERANGAN: Hakim Perbicaraan menjalankan pemeriksaan balas yang keras ke atas tertuduh dan saksi-saksi defendan - Sama ada dengan berbuat sedemikian Hakim Perbicaraan telah mengambil peranan sebagai pendakwa - Sama ada Hakim Perbicaraan telah melampaui had-had pencelahan kehakiman yang patut dalam pemeriksaan balas ke atas perkara-perkara yang tidak berbangkit daripada keterangan yang dikemukakan - Sama ada kesabitan kesalahan tertuduh adalah akibat pemeriksaan balas yang sedemikian - Pertimbangan s. 165 Akta Keterangan 1950 - Hak mendiamkan diri tertuduh - Hakim Perbicaraan memberikan komen-komen yang bertentangan di atas kegagalan tertuduh untuk mengemukakan pembelaannya sebelum perbicaraan - Sama ada Hakim Perbicaraan membuat kesimpulan bersalah daripada kebisuan tertuduh - Sama ada Hakim Perbicaraan telah salah mengarahkan diri beliau - Sama ada terdapat keterangan yang menjustifikasikan kesimpulan yang dibuat oleh Hakim Perbicaraan.

Ini merupakan rayuan terhadap kesabitan kesalahan dan penghukuman mati yang

dijatuhkan kerana mengedar 26.30 gram heroin, melanggar s. 39B(1)(a) Akta Dadah Berbahaya 1952. Dipenutupan kes pendakwa, Hakim Perbicaraan telah memutuskan bahawa terdapat kes untuk dijawab oleh perayu dan perayu telah dipanggil untuk memasukkan pembelaannya. Dalam perjalanan akan keterangan oleh defendan, Hakim Perbicaraan telah menjalankan pemeriksaan balas yang keras ke atas perayu dan saksi-saksi defendan. Perayu telah diperiksa balas apabila dipanggil semula oleh Mahkamah selepas dia selesai memberikan keterangan dan saksi-saksi lain telah diperiksa balas selepas pemeriksaan utama, pemeriksaan balas dan pemeriksaan semula dibuat oleh Peguam.

Atas rayuan, perayu menghujahkan bahawa Hakim tersebut telah mengambil peranan sebagai pendakwa dengan memeriksa balas perayu dan saksi-saksi defendan dan bahawa pemeriksaan balas ini bukanlah untuk tujuan semata-mata bagi mengesahkan testimoni yang telah diberikan tetapi lebih daripada itu, termasuklah dalam lingkungannya, perkara-perkara yang tidak berbangkit daripada keterangan yang dikemukakan, dan bahawa kesabitan kesalahan tersebut cuma berdasarkan kepada keputusan pemeriksaan balas yang sedemikian.

Perayu seterusnya menghujahkan bahawa dalam menimbangkan pembelaan perayu, Hakim tersebut telah salah mengarahkan diri beliau sejauh mana berkenaan dengan pemberian komen oleh beliau mengenai pembelaan yang menyarankan bahawa ada seorang saksi bagi defendan yang tidak harus tidak dipercayai kerana namanya tidkk disebutkan oleh perayu dalam pernyataan beramarannya kepada pihak polis dan tidak ada apa yang disebutkan mengenai saksi berkenaan sehinggalah perbicaraan tersebut dijalankan.

Diputuskan:

[1] Meskipun s. 16 Akta Keterangan 1950 mempunyai lingkungan yang luas, had-had pencelahan kehakiman yang patut dalam pemeriksaan dan pemeriksaan balas saksi-saksi yang dinyatakan dalam *Yuill lwn. Yuill* [1945] P 15 dan *Jones lwn. National Coal Board* [1957] 20B 55 akan terpakai dalam negara ini. Had-had ini terpakai secara dua kali ganda kuatkuasanya dalam kes soalsiasat oleh seseorang Hakim ke atas seseorang tertuduh memandangkan sifat pemeriksaan yang dibayangkan oleh s. 165 Akta Keterangan bukanlah pemeriksaan atau pemeriksaan balas yang bersifat ingin tahu bagi tujuan memerangkap seseorang tertuduh atau mendapatkan daripadanya pengakuan yang boleh memusnahkannya atas mana kes dapat dibina terhadapnya atau membuka ruang dalam keterangan pendakwaan. Ini adalah lebih-lebih lagi dalam kes seseorang terduduh yang menghadapi tuduhan hukum bunuh dan kegagalan hakim perbicaraan yang bersidang seorang diri dalam mengarahkan diri beliau dengan betul mengikut prinsip-prinsip tersebut mestilah disifatkan sebagai sama seperti gagal mengarahkan seorang juri dengan betul.

[2] Penghakiman tersebut menunjukkan bahawa Hakim dalam kes ini ada menjurus ke dalam arena dan membenarkan penghakimannya diselubungi oleh keputusaan pemeriksaan balasnya ke atas perayu dan saksi-saksi defendan yang lain. Selanjutnya penghakiman tersebut jelas menunjukkan bahawa Hakim berkenaan, dalam menjatuhkan humuman ke atas perayu, telah bergantung kepada keputusan pemeriksaan balasnya.

[3] Hakim yang bijaksana tersebut, dalam mengkriktik perayu di atas kegagalan perayu untuk memberitahu pihak polis akan nama pemandu teksi yang merupakan seorang saksi penting, telah gagal mengiktiraf bahawa perayu mempunyai hak untuk mendiamkan diri apabila disoalsiasat oleh pihak polis sama ada sebelum atau selepas diberi amaran.

[4] Walaupun seseorang Hakim boleh dengan patutnya memberi komen bahawa sesuatu penerangan telah diberikan buat kali pertama diperbicaraan, ini perlulah dijalankan dengan berhati-hati dan adil ke atas tertuduh dalam segala kaedaan kes tersebut.

[5] Di mana Hakim mengambil maklum mengenai kelewatan sesuatu penerangan dibuat oleh seseorang tertuduh buat kali pertama diperbicaraan sebagai mengurangkan keberatan penerangan tersebut, ini selalunya tidak adil melainkan beliau dengan jelasnya mengiktiraf hak untuk tertuduh mendiamkan diri dan bahawa beliau tidak akan membuat kesimpulan bersalah daripada kebisuan yang sedemikian. Dalam kes semasa ini, penghakiman Hakim tersebut jelas mempunyai kekurangan dari segi apa yang disebutkan di atas dan oleh yang

demikian terdapat salah arahan yang nyata ke atasnya.

[6] Kesilapan Hakim tersebut, pertamanya menjuruskan dalam arena tersebut dan keduanya, dalam membenarkan penghakiman fakta-fakta beliau diselubungi oleh keputusan pemeriksaan beliau, sesuatu yang mustahak yang diarahkan kepada ketidakdedahan oleh perayu mengenai pembelaannya, sudah cukup untuk membawa kepada kesabitan kesalahan tersebut dibatalkan.

[7] Tiada sebarang keterangan untuk menjustifikasikan kesimpulan yang dibuat oleh Hakim perbicaraan bahawa perayu hendak menjalankan satu jualan dadah kepada beberapa orang pada atau kira-kira waktu dia ditangkap dan penghakiman Hakim yang bijaksana tersebut juga diragui atas alasan yang berkaitan dengan kedapatan fakta oleh Hakim tersebut akibat kritikan beliau terhadap kes perayu. Dalam hal ini salah laksana keadilan mungkin telah berlaku.

[Kesabitan kesalahan dibatalkan. Hukuman mati diketepikan. Perayu dilepaskan dan dibebaskan].

Cases referred to:
Brassington v. Brassington [1962] P 276 at 281 ***(refd)***
Yuill v. Yuill [1945] P 15 ***(foll)***
Jones v. National Coal Board [1957] 2 QB 55 62 ***(foll)***
R v. Gilson [1944] 2 Cr. App. R. 174 ***(refd)***
R v. Clewer [1953] 37 Cr. App, R. 37 ***(refd)***
Hobbs v. Tinling [1929] 2 KB 1 ***(refd)***
R v. Green [1949] WN 488 ***(refd)***
R v. Mc Kenna [1960] 1 QB 411 ***(refd)***
R v. Hirock [1970] 1 QB 67 ***(refd)***
R v. Matthews & Matthews [1984] 78 Cr. App. R. 23 ***(refd)***
R v. Gilson and Cohen [1944] 29 Cr. App. R. 174 ***(dist)***
R v. Cain [1936] Cr. App. R. 204 ***(dist)***
R v. Bateman [1946] 31 R Cr. App R 106 ***(dist)***
Gan Kok Liong v. PP [1969] 1 MLJ 32 ***(dist)***
R v. Clewer [1953] 37 Cr. App. Rep. 37 ***(dist)***
Roseli bin Amat & Ors. v. PP [1989] 2 MLJ 65 ***(dist)***
R v. Hall [1971] 1 WLR 298 ***(refd)***
Rex v. Chui Yi [1936] MLJ Rep. 142 ***(refd)***
Fazal Din v. PP [1949] MLJ 71 ***(refd)***
R v. Ryan [1973] 2 NZLR 611, 615 ***(refd)***
R v. Gilbert [1977] 66 Cr. App R 237, 244 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 402A
Dangerous Drugs Act 1952, ss. 37A(1)(b), 39B(a)
Evidence Act 1950 (Revised 1974), s. 165

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 11, para 299
Pleading Evidence and Practice, Archbold, 1992 Edn., para 4-407

For the appellant - W.P. Leong; M/s. W.P. Leong & Partners
For the respondent - Ng Aik Guan, DPP

JUDGMENT

Edgar Joseph Jr. SCJ:
This was an appeal against conviction and sentence of death for trafficking in a dangerous drug, to wit, 26.30 grammes of heroin, in contravention of s. 39B (a) of the Dangerous Drugs Act 1952, ("the Act").

The case for the prosecution in outline was that on 20 January 1986, at about 8.00 p.m., a police party consisting of Inspector Jasbir Singh (PW3) and three of his men, proceeded to a housing complex known as Taman Sentosa, Johor Bahru, and on arrival there took up ambush position.

It was said that at about 8.20 p.m. a motorcar arrived and pulled up at a point close to where members of the police party were lying in wait unbeknown to the driver of the car who was identified as the appellant.

It was further said that the appellant then alighted from the car, walked along Jalan Sutera 3, passing Inspector Jasbir Singh and one of his men Zainuddin Khalid (PW5), and then proceeded to a lane which bore no name, described by the trial Judge, as "Lorong yang tidak ada nama". He was quickly followed by Inspector Jasbir Singh and Zainuddin. On arrival at the junction of Lorong yang tidak ada nama and another road called Jalan Sutera 5, it was alleged that the appellant first looked back and then took to his heels, running along Jalan Sutera 5 pursued by Inspector Jasbir Sigh and Zainuddin. After a short chase, Inspector Jasbir Singh managed to catch up with the appellant and, with the help of Zainuddin, managed to overpower him, A search of the person of the appellant followed and it was alleged that there was recovered from beneath the waist of his trousers a newspaper wrapping which contained a plastic packet in which was a substance suspected to be heroin, and later confirmed by the Government chemist to be so, in weight 26.30 grammes. Also recovered from the person of the appellant, was a car key and a purse containing RM 694. A search of the appellant's home, later, on the same night, disclosed nothing incriminating.

Upon that evidence, the trial Judge ruled that there was a case for the appellant to answer.

The appellant elected to give sworn evidence. His version was that on the night in question, he was at home when his brother Tan Booy Keng (DW2) arrived driving his (the Appellant's) car JBL 993 a car which he (the Appellant) had purchased on hire purchase terms even though he had no driving license. The brother then invited the appellant to go shopping with him to the Sentosa Shopping Complex. The appellant agreed; so they proceeded to the Sentosa Shopping Complex in the car with the brother at the wheel and, on arrival there, pulled up and parked the car at the place described by Inspector Jasbir Singh.

However, on alighting the appellant had second thoughts and told his brother that he would be visiting a friend, indicating a place nearby, and that he would catch up with the brother later in the Sentosa Shopping Complex.

The appellant claimed that he then walked along the route indicated by Inspector Jasbir Singh in Court and that as he passed by a few houses along Jalan Sutera 5, he noticed a man running towards him and who had emerged from a house to his right. This man, said the appellant, had bent down slightly and then threw a packet under a car that was parked nearby. He then continued to run towards the appellant, and knocking into the appellant, causing the appellant to spin and to fall to the ground as a result of which the appellant suffered injuries and tears to his trousers. Just then, Inspector Jasbir Singh appeared on the scene and arrested the appellant. The appellant then alleged that Inspector Jasbir Singh picked up the packet from underneath the parked car, not the appellant's car, but the other car - opened the packet and showed its contents to the appellant.

The brother corroborated the appellant's version regarding his visit to the appellant's house on the night in question, and their leaving together in the appellant's car to go to the Sentosa Shopping Complex, as the brother wished to buy some household items, like tooth paste, toilet paper and how they parted company outside the Shopping Complex when the appellant suddenly recalled that he had to see a friend.

But, there was another witness - an important one - a taxi driver named Loh Chin Wah (DW3), who claimed that he was on the scene at the material time, sitting in the driver's seat of his stationary taxi with head lights on, having just dropped a passenger, some 10 to 20 feet away from the appellant, who was in front of him.

He then went on to corroborate the appellant's version about seeing a man emerge from a house to the appellant's right, running, and being pursued by a group of people, and this man knocking into the appellant. The rest of his evidence, in the words of the Judge, "corroborates to almost exactly what was stated by the Accused - (the Appellant)". The Judge noted that this witness had even testified that he saw Inspector Jasbir Singh pick up the packet containing the heroin from underneath a parked car, show it to the appellant, and then take the appellant away in another car parked nearby.

In the course of the trial, the Judge himself subjected to somewhat severe cross-examination, the appellant (upon re-call by the Court), his brother Tan Booy Keng and the taxi driver Loh Chin Wah, though he did not cross-examine any of the prosecution witnesses.

The cross-examination of the appellant by the Court took place after he had been examined, cross-examined by the Deputy Public Prosecutor, and re-examined by defence Counsel; more particularly, it was upon re-call by the Court on the day after his re-examination was concluded and was as follows:

> On 20 January 1986, I wished to look for a friend an ordinary friend. His name is Ah Hwa. I know his address is 46, Jalan Sutera 5.
>
> He rents a room. Before the incident I did not go to his place. Before the incident I knew him. Once or twice I had met him there.
>
> I did not make an appointment to meet him on that day. It was after work and he was in the house.
>
> Ah Hwa is a wireman.
>
> I told my brother my friend's name 9 months after I was arrested because I did not know that the matter would become important. When my brother met me 9 months after the incident I told him Ah Hwa's name.
>
> I did not disclose Ah Hwa's name to police because the police did not ask me. ASP M. Ali did not ask me any question.
>
> Another officer asked me questions. When he asked I did not want to answer because I wanted to answer in Court. After I was

arrested I was brought by police several times from one place to another. As a result I did not want to disclose this matter to the police. I had been arrested by police.

I had given information regarding the taxi to the police within one week after my arrest. I gave that information to one police officer. I can't recognize that officer. He did not ask me other questions regarding this matter.

I was questioned by one police officer. I did not want to answer because I wanted to give a statement in Court and not in his office. I did not give the information to the police at that time because friends in the lock-up and prison told me not to give evidence to the police.

Few months after the incident my family engaged a lawyer. I gave that information to the lawyer. I do not know whether the lawyer had written a letter to the public prosecutor regarding this information.

If my brother did not see me on the day of the incident I would still have gone and looked for Ah Hwa.

The cross-examination of the appellant's brother Tan Booy Keng by the Court, occurred after he had been examined in chief, cross-examined, and re-examined, and was as follows:

The items that I bought from Sentosa complex are tissue paper, tooth brush, tooth paste, soap and things that we use in the house.

The provision shop where I worked is not mine. The name of the provision shop owner is Yeo Hai Jee.

The provision shop does not sell tooth paste, tooth brush, tissue paper and soap.

The provision shop does not sell all those items.

When I went to see the accused in the police lock-up, I went with the accused's wife. There was no other person.

At the police station I spoke to the accused in an office. Also present were a police officer and another officer who brought the accused.

I do not know for how long we were talking. At that time he did not tell me about his friend's name.

The second time I met him was about 7 to 8 months after the accused was in the prison. I did not see him after the first meeting because the prison authority did not allow me to do so.

Within 7 to 8 months I could have met him but I had no time to go. His wife met me. His wife did not tell me Ah Hwa's name. The accused told me the name.

On 20 January 1986 on my way to Taman Sentosa I stopped by the accused place and asked if he wished to follow me. I asked the accused to follow me to buy things. When I met the accused, he did not tell me that he wished to see his friend. In the car from the accused's residence to Taman Sentosa the accused did say that he wished to look for his friend.

I was not surprised when he said he wished to see his friend when he parked his car.

The accused gave me 2-3 keys. One of them could start the engine. The rest for locking the petrol tank.

When the car was purchased by the accused, it was brought to my house. After that I used the car.

I did not ask whether he had checked on the driving licence.

I did not see the accused drive the car any where.

When the representative from the company sold the car, he sent the car to my house. At that time I was not in the house. The accused and the representative brought the car.

The accused gave me the keys. I received the keys only. Only one key could start the car. Other keys could not.

The cross-examination of the taxi driver Loh Chin Wah by the Court also occurred after he was examined in chief, cross-examined and re-examined, and was as follows:

Witness marks "X" with green pen on the sketch plan showing where the man was running from the house. The house from where the man was running was about 6 or 7 houses in front of me.

The distance from me where the man who was running knocked into the accused was 10' to 20'.

When the man who was running threw the packet, the distance from me was about 10' to 20'.

Witness demonstrates in Court where the man who was running had bended slightly and threw the packet of thing underneath the car. The car was 10' to 20' from me. I can't recall the colour of the car.

The car into which the accused was taken after the arrest was parked in front of me three or four houses away from me. The back of the

car was facing me. I can't recall the colour of the car.

Jalan Sutera 5 can be seen if it is not dark. I can remember the accused's clothing. Short sleeved shirt and trousers. I can't recall the colour of his shirt and trousers.

Including the accused there were about 5 or 6 persons at the place of incident and they had surrounded the accused.

There was no lamp post at the place where the man who was running, knocked into the accused.

Before the clash, the accused was walking on my right side from the back.

At the time of incident, I saw the accused walking only.

I can't recall if within 3 to 4 minutes during the incident any car had passed me to Jalan Sutera 5.

I have been driving taxi for 6 to 7 years. Before the incident I had been driving taxi for one or two years. The taxi which I drove on that day belonged to my friend. I have a licence for driving taxi. On the day of the incident I was not registered with anyone to drive the taxi.

After the accused fell down one Singh arrived. That Singh caught hold of the accused.

The man who was running from the house was wearing short sleeved shirt and long trousers. Its colour I cannot recall. The man who was running was about five feet or more tall.

The distance between the man who was running away and the Singh who was chasing him along Jalan Sutera 5 was 20' to 30'. I did not see the Singh chasing after the man who was running after he knocked into the accused.

Singh caught the accused before picking up the packet from underneath the car.

The place where the accused fell and where the Singh picked up the packet was just nearby.

No police officer interviewed me after the incident day.

Before I become a taxi driver I was a construction worker. I worked as a cement mixer in Kota Tinggi.

I was born in Kota Tinggi. I have not married.

I do not know the accused nor his family.

Nobody from the accused or his family or his friend gave me money for giving evidence.

On that day I worked from 5.00 p.m. till mid-night.

Before us, the principal grounds of appeal argued were twofold; namely, firstly, that, the Judge had assumed the role of a prosecutor by cross-examining the appellant and the defence witnesses and that this cross-examination was not for the purpose of just clarifying testimony given but went much further, including within its range, matters not arising from the evidence adduced, and that the conviction was based mainly upon the results of such cross-examination.

Secondly, it was argued that in considering the defence of the appellant, the Judge had misdirected himself inasmuch as his comments on the defence suggested that the vital witness for the defence, being the taxi driver Loh, should be disbelieved because his name had not been disclosed by the appellant in a cautioned statement to the police and that it was not until the trial that there was such disclosure.

Similarly, the appellant was critised for not having made prior disclosure to the police of the name of his friend Ah Hwa. In this context, it was pointed out that the cross-examination of the appellant by the Judge, to which exception was taken, included such matters.

As there was a certain amount of overlapping between the two principal grounds of appeal to which we have referred, we consider it would be more convenient if we were to deal with them together.

Judicial loquacity has provided grounds for appeal and we need no more than refer to some of the well know cases in this area.

Excessive interventions by the trial Judge add "great weight to the substance of the appeal" (*Brassington v. Brassington* [1962] P 276 at 281) and taken together with other grounds of appeal may result in the reversal of judgment in a civil case (*Yuill v. Yuill* [1945] P 15); *Jones v. National Coal Board* [1957] 2 QB 55 62) or setting aside of a conviction in a criminal case. (See *R. v. Gilson* [1944] 2 Cr. App.R 174; *R v. Clewer* [1953] 37 Cr. App.R 37). In certain circumstances, the criticism of the conduct of the trial Judge is of such magnitude as to constitute by itself a sufficient ground for

reversal of the judgment (See *Hobbs. v. Tinling* [1992] 2 KB 1; *Jones v. National Coal Board (ibid)*] or quashing of the conviction. [See *R v. Green* [1949] WN 488, *R v. Mc Kenna* [1960] 1 QB 411]. In other cases, even though the interventions of the Judge may not result in the quashing of the conviction, the appellate Court may reduce the sentence thus giving effect to its disapproval (See e.g. *R v. Hirock* [1970] 1 QB 67)

It was Lord Greene MR who explained that justice is best done by a Judge who holds the balance between the contending parties without himself taking part in their disputations. If a Judge, said Lord Greene, in *Yuill v. Yuill (ibid*), should personally conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict".

And, it was Lord Denning MR who in *Jones v. National Coal Board (ibid*), emphasised the importance of the Judge not descending into the arena and thereby depriving himself of the ability to take a detached view when forming his conclusion. This is how he put it:

> Yes, he (the Judge) must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales - the 'nicely calculated less or more' - but the Judge at the end decides which way the balance tilts, be it ever so slightly ... So also it is for the advocates, each in turn, to examine the witnesses, not for the Judge to take it on himself lest by so doing he appear to favour one side or the other ... And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost ... The Judges' part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a Judge and assumes the robes of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; an overspeaking judge is no well-tune cymbal'.

In *R v. Matthews & Matthews* [1984] 78 Cr App R 23, the Court of Appeal in England said (at p. 30 para 6) that the general comment in *Jones v National Coal Board (ibid),* emphasising the importance on a Judge not descending into the arena and thereby depriving himself of the ability to take a detached view when forming his conclusion, is equally applicable to a criminal trial.

We agree that notwithstanding the wide ambit of s. 165 of the Evidence Act (Revised 1974), which provides:

> 165. Judge's power to put questions or order production.
>
> The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.
>
> Provided that -
>
> (i) the judgement must be based upon the facts declared by this Act to be relevant and duly proved;
>
> (ii) this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which the witness would be entitled to refuse to answer or produce under ss. 121 to 131 if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under ss. 148 or 149, nor shall he dispense with the primary evidence of any document, except in the cases hereinbefore excepted,

the desirable limits of judicial intervention in the examination and cross-examination of witnesses enunciated in *Yuill v. Yuill* and *Jones v. National Coal Board* would apply in this country. These limits apply with double force in the case of interrogation by a Judge of an accused person since, in our view, the nature of examination contemplated by s. 165 of the Evidence Act is not examination or cross examination of

an inquisitorial nature for the purpose of entrapping an accused or of extracting from him damaging admissions upon which to build up a case against him or to supply a gap in the evidence for the prosecution. Especially is this so, in the case of an accused facing a capital charge. We must therefore treat the failure of a trial Judge sitting alone, to direct himself correctly in accordance with these principles, in the same way as a failure to direct a Jury correctly.

We have also considered cases such as *R v. Gilson and Cohen* [1944] 29 Cr App R 174., *R v. Cain* [1936] Cr. App. R 204, *R v. Bateman* [1946] 31 R. Cr App R 106 cited with approval in *Gan Kok Liong v. PP* [1969] 1 MLJ 32, *R v. Clewer* [1953] 37 Cr App. Rep 37, but these cases can, to some extent, be distinguished from the present case, because, unlike the present case, the interventions by the Judge by way of cross-examination were during the examination in chief or cross-examination of the accused person or his witnesses.

Similarly, the Singapore case of *Roseli bin Amat & Ors. v. PP* [1989]2 MLJ 65 is also distinguishable because there, unlike here, there were interruptions preventing the accused from giving evidence in their own way and making adverse comments, of the following sort:

(i) excessive interruptions by the learned Judge in the examination and cross-examination of witnesses by Counsel with the consequence that Counsel were unduly hampered in the cross-examination of the prosecution witnesses and in the examination of their own clients;
(ii) unfair and improper cross-examination by the learned Judge of the appellants in a hostile manner including disallowing them to give evidence in their own way; and
(iii) making adverse comments or observations which strongly indicated that the learned Judge had closed his mind and pre-determined the guilt of the appellants prior to considering all the evidence before him.

Nevertheless, we were reluctantly driven to the conclusion, that the Judge did in this case descend into arena and did allow his judgment of the facts to be clouded by the results of his cross-examination of the appellant, the brother Tan Booy Keng, and the taxi driver Loh Chin Wah, though we do not doubt that he was actuated by the best of motives.

As for allowing his judgement of the facts to be clouded by the results of his cross-examination, we need no more than refer to the following extracts from his judgement which show clearly that the Judge did, in convicting the appellant, rely on the results of his cross-examination of the appellant:

> What puzzled the Court was why was this information about the existence of a vital witness (the taxi driver) not told to the police until this hearing.
>
> In answer to question by the Court on this point, the accused replied that he was not being asked by the police authorities. Again when pressed further, the accused replied that he refused to give any statement to the police because the officer sent to record his statement informed him that he could either give a statement then or inform the Court of the same during hearing date. The accused of course chose to stay almost 4 $^1/_2$ years in jail to tell this Court about the existence of a taxi driver who alleged that he saw everything.
>
> The Court questioned the accused as to why he was visiting his friend on that particular day and the name and address of his friend he intended to visit on that particular day.
>
> The accused testified that the name of his friend is one Ah Hwa, who resided in one of the houses along Jalan Sutera 5. His intention of visiting Ah Hwa was to ask Ah Hwa to work for him.
>
> Ah Hwa could not be contacted to testify because DW2 was only told of Ah Hwa some 8 to 9 month after the arrest of the accused. When DW2 attempted to locate Ah Hwa, Ah Hwa "sudah pindah rumah" and cannot be found.
>
> Again why was the existence of Ah Hwa not told to the police authorities earlier. This again could have assisted the police authorities to check on the accused's contention and could have even secured his immediate release. However, the accused's reply was that he was not being asked and he prefers to give his version of the events in Court some 4 $^1/_2$ years later.

This brings us to the second ground of appeal closely connected with the first ground of appeal in that the cross-examination by the Judge of the appellant was aimed at criticizing the appellant for his failure to disclose to the police, by way of a cautioned statement, the name of the taxi driver who was a vital witness.

The appellant was also pressed in cross-examination by the Judge for his failure to inform the police about his friend Ah Hwa or, in other

words, about his parting company with his brother outside the Shopping Complex because he suddenly decided to visit Ah Hwa and ask the latter to work for him.

The appellant explained his omission to give a statement to the police by saying that the police officer who had been sent to record his statement had informed him that he could either make a statement or say what wished to say in Court. We find nothing improbable in this explanation yet the Judge looked at it askance.

Be that as it may the Judge failed to recognise, firstly, that the appellant had a right to silence when interrogated by the police whether before or after caution. Indeed, the terms of the statutory caution under proviso (b) to s. 37A(1) of the Dangerous Drugs Act merely reminds him of a right he already has at Common Law to refrain from answering a question put to him for purpose of discovering whether he has committed a criminal offence. (Per Lord Diplock in *R v. Hall* [1971] 1 WLR 298). The exception to this rule, is where the defence of the accused is an alibi (See the statutory obligation on an accused to give notice to the prosecution of a defence of alibi under s. 402A of Criminal Procedure Code). Even prior to the introduction of the 402A of the Criminal Procedure Code, an alibi defence was an exception to the rule that it is improper for a Judge to make any adverse comment on the failure of an accused to disclose his defence until the trial. (See, e.g. *Rex v. Chui Yi* [1936] MLJ Rep. 142, *Fazal Din v. PP* [1949] MLJ 71)

Secondly, although a Judge may properly comment that an explanation has been given for the first time at the trial, this has to be done with care and fairness to the accused in all the circumstances of the case. (See *R. v. Ryan* [1973] 2 NZLR 611, 615). The Privy Council and English authorities show that the dividing line between what is fair comment and what is not has been recognised to be a fine one. [See 11 **Halsbury's Laws of England,** 4th Edn. para 299 Archbold "**Pleading Evidence and Practice,** (1992 Edn., para 4-407).

It had been said that there is clear distinction between drawing an inference of guilt from prior silence and taking into consideration such silence as diminishing the weight of any explanation given by the accused for the first time at the trial. However, as Lord Dillhorne speaking for the Court of Appeal, in *R v. Gilbert* [1977] 66 Cr App R 237, 244, rightly pointed out, there is no clear dividing line, as in each situation the jury are invited to draw an inference adverse to the accused on account of his exercise of the right to silence. It follows that in practice the distinction is too fine to be of any practical value even if the trial is before a Judge sitting alone.

Where the Judge takes into consideration the belatedness of an explanation offered by an accused for the first time at the trial as diminishing the weight of that explanation this will usually not be fair unless he makes it clear that he recognises the right of the accused to remain silent and that he is not drawing an inference of guilt from such silence. No particular form of words is necessary provided his mind on the matter is clearly revealed in his judgement. In the present case, the judgement of the Judge clearly suffers from these defects and so there was clearly a misdirection on this score.

It follows, from what we have said thus far, that the Judge had fallen into error, first, in descending into the arena and, secondly, in allowing his judgement of the facts to be clouded by the results of his cross-examination, an important part of which was directed at the non-disclosure by the appellant of his defence, including the names of the taxi driver and his friend Ah Hwa to the police. Taken together, these errors, were sufficient to lead to the quashing of the conviction.

That, however, is not the end of the matter because towards the end of his judgement, the Judge found that at or about the time of his arrest the appellant was about to carry out a sale of dadah (a dangerous drug) to some person near the booth and, that being early, the appellant had proceeded to the telephone booth to make a call, when he noticed that he was being watched by Inspector Jasbir Singh and DPC Zainuddin Khalid, so he proceeded along the lane known as Lorong yang tidak ada nama, with the intention of slipping away, and later returning to his car. With respect to the Judge, there was not a tittle of evidence justifying these inferences.

Unfortunately, the judgement was also vulnerable on other grounds and these related to the following findings of fact by the Judge by way of criticism of the appellant's case:

> (i) The (proposed) visit to Ah Hwa on the night of the incident was apparently not planned. I find this **strange**. (p 134 para 1)
> (emphasis provided),

when the correct approach should have been, whether this might reasonably have been true.

> (ii) In the light of all these circumstances. Ah Hwa **seems** to be a creation after the event .
> (p. 134 para 2) (emphasis provided),

which fell far short of a positive finding that the story about Ah Hwa, was a recent invention.

> (iii) The accused denied that he was driving on that particular day. The accused contended he has no driving licenses. Nevertheless, the accused purchased a car with an initial outlay of RM8,000 and incumbered himself with approximately RM500 per month towards instalments under hire purchase. **This car he allowed his brother to drive while the car is registered in his own name**
> (p. 134 para 3)
> (emphasis provided),

when there was nothing improbable about these averments

> (iv) ... I find it **strange** that DW2 (the Appellant's brother) happened to drop by the Accused's place and asked him to go shopping. DW2 was not even sure whether the accused was around at the material time when he dropped by.
> (p. 134 para 4) (emphasis provided),

when the correct approach should have been whether this might reasonably have been true.

> (v)... why would DW2 (the Appellant's brother) want to go shopping for household items such as tooth paste and toilet or tissue paper when he himself was working for a fairly large provision shop that has all these items in stock.

overlooking the fact that the explanation of DW2 that the provision shop at which he worked did not sell the items he required (p. 134 para 4), was never disproved by the prosecution.

> (vi) It is **strange** that the accused did not see anyone chasing the person who knocked into him.
> (p. 135 para 1) (emphasis provided),

when the correct approach should have been whether this might have been reasonably true.

> (vii) The manner that that accused fell was also rather unusual. From the tear of the trouser and the injuries sustained by the accused, it is more in line with PW5 downing him from the rear,

in the absence of forensic medical evidence supporting such a finding.

> (viii) The time of the incident was approximately 8. 30 p.m. The defence contended that it was not very dark which I find hard to believe.
> (p. 135 para 3),

although Inspector Jasbir Singh had himself testified that visibility was good, it being bright ("Permandangan terang").

In all the circumstances, we were completely convinced that a miscarriage of justice might well have occurred. Accordingly, the conviction was quashed, the sentence of death set aside and the appellant acquitted and discharged.